**HeartShare Human Services of New York, Inc. *and* Office and Professional Employees Union, Local 153, AFL–CIO.** Case 29–CA–18852

May 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

Pursuant to a charge filed by the Union on January 23, 1995, the General Counsel of the National Labor Relations Board issued a complaint on March 3, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 29–RC–8269. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On April 28, 1995, the General Counsel filed a Motion for Summary Judgment. On May 2, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On May 16, 1995, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits that it is an employer subject to the Board's jurisdiction and that the charge was filed and served in this proceeding, but denies all other allegations of the complaint and asserts as affirmative defenses that the bargaining unit certified by the Board is inappropriate, that the Union engaged in objectionable conduct affecting the results of the election, and that certain of its instructors who voted in the election are statutory supervisors under *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994), and should be excluded from the unit. In addition, in its response to the Notice to Show Cause, the Respondent contends that, due to substantial turnover since the election, the Union no longer represents a majority of the unit.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.[1] The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Although the Respondent's answer denies the complaint's allegations that the Union was certified and requested bargaining and that the Respondent has refused, we find that the Respondent's denials in this regard do not raise any issue warranting a hearing. The Respondent's answer denies the allegation that the Union was certified on January 4, 1995, solely on the ground that the certification was improper, and thus to this extent clearly seeks to raise issues that were or could have been litigated in the representation proceeding. Although the Respondent's answer also denies that the Union subsequently requested bargaining by telegram dated January 6, 1995, a copy of the Union's January 6, 1995 telegram to the Respondent's director requesting negotiations is attached as an exhibit to the General Counsel's motion, and the Respondent has not disputed the authenticity of that document in response to the Notice to Show Cause. Although the Respondent's answer further denies that the Respondent has refused to bargain with the Union since its January 4, 1995 certification, again it does so solely on the ground that the certification was improper. Moreover, in response to the Notice to Show Cause, the Respondent specifically states that it has refused to bargain in order to seek an appeal of the Board's decision.

Finally, we reject the Respondent's contention in its response to the Notice to Show Cause that the complaint should be dismissed because of turnover in the unit since the election. It is well-established that employee turnover is not a valid basis for refusing to bargain with a union in the instant circumstances.[2]

[1] With respect to the Respondent's contention that certain of the instructors who voted in the election are supervisors, we note that the Respondent raised this issue for the first time in its exceptions to the hearing officer's report on the Employer's objections to the election. At no time prior to the election did the Respondent raise any issue as to the supervisory status of the instructors. Under longstanding Board policy, the Respondent's contention was therefore barred as it in effect constituted a postelection challenge in the form of an objection. See *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946). See also *Poplar Living Center*, 300 NLRB 888 fn. 2 (1990); and *Prior Aviation Service*, 220 NLRB 460 (1975). The fact that the Supreme Court issued a decision in *Health Care & Retirement* shortly after the election in which it rejected the Board's interpretation and application of the statutory phrase ''in the interest of the employer'' in determining the supervisory status of nurses, does not in our view warrant disregarding the Board's well-established policy against postelection challenges in this case.

[2] See, e.g., *Action Automotive*, 284 NLRB 251 (1987), enfd. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989); and *Murphy Bros., Inc.*, 265 NLRB 1574 (1982) (employee turnover not the kind of ''unusual circumstance'' within the meaning of Supreme Court's decision in *Ray Brooks v. NLRB*, 348 U.S. 96 (1954), that

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Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all times material, the Respondent has been a New York corporation with a place of business located at 163 MacDonough Street, Brooklyn, New York, where it is engaged in the operation of a day treatment center for developmentally disabled adults. During the 12-month period preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000 and purchased and received products, goods, and materials valued in excess of $50,000 directly from firms located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Certification*

Following the election held May 12, 1994, the Union was certified on January 4, 1995, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All senior instructors, assistant instructors, behavioral specialists, dietary aides, maintenance employees and receptionists employed by the Employer at its MacDonough Street, Brooklyn, New York location, excluding all other employees, coordinators, assistant coordinators, administrative assistants, unit coordinators, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

#### B. *Refusal to Bargain*

About January 6, 1995, the Union, by telegram, requested the Respondent to bargain. Since about January 4, 1995, the Respondent has refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By refusing on and after January 4, 1995, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, HeartShare Human Services of New York, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Office and Professional Employees Union, Local 153, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All senior instructors, assistant instructors, behavioral specialists, dietary aides, maintenance employees and receptionists employed by the Employer at its MacDonough Street, Brooklyn, New York location, excluding all other employees, coordinators, assistant coordinators, administrative assistants, unit coordinators, guards and supervisors as defined in the Act.

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would permit rebuttal of union's majority status or warrant reexamination of certification).

[3] The Respondent's answer denies knowledge or information sufficient to form a belief as to whether the Union is a labor organization. The Respondent, however, failed to raise any issue as to the Union's labor organization status in the underlying representation proceeding. Its failure to do so precludes the Respondent from raising an issue as to the Union's status in the instant proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992).

(b) Post at its MacDonough Street, Brooklyn, New York facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Office and Professional Employees Union, Local 153, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All senior instructors, assistant instructors, behavioral specialists, dietary aides, maintenance employees and receptionists employed by us at our MacDonough Street, Brooklyn, New York location, excluding all other employees, coordinators, assistant coordinators, administrative assistants, unit coordinators, guards and supervisors as defined in the Act.

HEARTSHARE HUMAN SERVICES OF NEW YORK, INC.